Case No: DA 09-0632

IN THE SUPREME COURT
OF THE STATE OF MONTANA

DEREK STEBNER and STEBNER REAL ESTATE, INC., a Washington Corporation,

Plaintiffs and Appellants

-vs-

ASSOCIATED MATERIALS, INC. (AMI) d/b/a ALSIDE,

Defendant and Appellee

APPELLANTS' BRIEF

On Appeal from the Fourth Judicial District Court, Missoula County

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Should Plaintiffs be awarded a new trial because of juror misconduct which occurred when one juror introduced an online definition of "preponderance" to the Jury, which the juror had researched outside of the jury room, and the Jury subsequently moved from a 6-6 deadlock to a 11-1 verdict in favor of Defendant?

II. STATEMENT OF THE CASE

The present case involves a dispute over warranty coverage for damaged siding. Plaintiffs, Derek Stebner and Stebner Real Estate, Inc., purchased the Riverside Apartment Complex in Missoula, Montana, in 2004. As part of the purchase of the apartment complex, Plaintiffs were transferred a warranty for the siding on the buildings which was manufactured by Defendant Associated Materials, Inc. After the purchase was completed, Plaintiff made a claim under the warranty at issue. Defendants denied the warranty claim and the present lawsuit was filed.

A jury trial took place from September 15, 2009, to September 18, 2009, at the Montana Fourth Judicial District Court. After the case was submitted to the jury, the jurors considered the matter on the afternoon of September 17, 2009, and the morning of September 18, 2009. On the night

of September 17, one of the jurors conducted online research which was presented to the remaining jurors during deliberations the following morning. Further, several jurors had conversations about the case outside of the jury room and the presence of all of the jurors. Evidence suggests that these actions by jurors changed the outcome of the case.

After trial, Plaintiffs filed a Motion and Brief in Support of a New Trial Under Rule 59, which was denied by the District Court. The District Court filed a Judgment Upon Jury Verdict on October 27, 2009. Plaintiffs now appeal that Judgment.

III. STATEMENT OF FACTS

Plaintiffs, Derek Stebner and Stebner Real Estate, Inc. ("Stebner"), purchased the Riverside Apartment Complex in Missoula, Montana, in 2004. Final Pretrial Order, Agreed Fact # 2, p. 1–2 (Mar. 11, 2009) (Exhibit A). When the Riverside Apartment Complex was constructed, Defendant Associated Materials, Inc. ("Alside") installed steel siding on the building. *Id.* at Agreed Fact # 3, p. 2. The "Steelside 5" exterior siding installed on the building by Alside was sold with a Limited Warranty. *Id.* This Limited Warranty was transferred to Stebner in 2004 when it purchased the Riverside Apartment Complex. *Id.* at Agreed Fact # 6, p. 2.

A dispute arose after Stebner filed a claim under the Limited Warranty in July of 2004. *Id.* at Agreed Fact # 7. Stebner sought replacement of the siding under the Limited Warranty for siding which had rusted and faded. *Id.* Alside denied Stebner's claim under the Limited Warranty on the basis that the alleged defects of rust and fading were not covered under the terms of the Warranty. *Id.* at Agreed Fact # 8, p. 2. The parties could not resolve the breach of warranty claim and the case proceeded to trial.

A jury trial was held in this case from September 15, 2009, to September 18, 2009, in Montana's Fourth Judicial District Court. The Jury entered the jury room for deliberations at approximately 4:00 p.m. on Thursday, September 17, 2009. Affidavit of Christine Strukel, ¶ 2 (Sept. 18, 2009) (Exhibit B). Upon entering the jury room, several jurors stated they had reached a decision and that they wanted the matter decided by 5:00 p.m., when the Jury was to be excused in order to allow one of the jurors to pick up a child. *Id.* An initial poll conducted by the Jury demonstrated that six jurors favored Stebner and five voters favored Alside. *Id.* at ¶ 3. The final juror abstained from the initial vote. *Id.*

When the Jury began deliberating after the initial vote, one juror

"announced a strong opinion and took a stand for a particular verdict." *Id.* at ¶ 4. This juror suggested that at least one other juror should surrender an honest conviction. *Id.* Only one juror reviewed the evidence in the exhibit book. *Id.* at ¶ 5. Prior to the end of deliberations on September 17, the Jury conducted another poll. *Id.* at ¶ 6. At this time, six jurors favored Stebner and six jurors favored Alside. *Id.*

After leaving the jury room, three jurors engaged in a conversation outside of the courthouse. *Id.* at ¶ 7. They suddenly stopped this conversation when they noticed another juror listening to their discussions. *Id.* In addition to conversations by jurors outside of the jury room, the Jury used an outside resource to help determine the definition of the term "preponderance." *Id.* at ¶ 8. They did so despite being instructed by the Court not to consider evidence or materials which were not presented inside the courtroom. *See,* Pattern Instruction MPI2d 1.04, General - Precautionary Instruction. (Exhibit C).

The Jury returned to the jury room at 8:30 a.m., Friday, September 18, 2009. Aff. Strukel at ¶ 9. Although the jury was deadlocked at 6-6 the night before, within five minutes of returning to the jury room on Friday, the Jury voted 11-1 in favor of Alside. *Id.*

After trial, Stebner filed a Motion and Brief in Support of a New Trial Under Rule 59. (Exhibit D). In an Order, issued on October 27, 2009, the District Court denied Stebner's Motion for a New Trial. (Exhibit E). The Court's Order based its denial of the motion on "the reasoning of *Erickson and Perrett* (1977), 175 Mont. 87, 572 P.2d 518, which requires the alleged jury misconduct must affect a material matter that is in dispute and must prejudice the complaining party sufficiently enough to render the jury's verdict manifestly unjust to warrant the granting of a new trial." (Exhibit E, p. 1). The District Court filed a Judgment Upon Jury Verdict on October 27, 2009. (Exhibit F).

IV. STANDARD OF REVIEW

When there is a manifest abuse of discretion on the part of the district court judge in denying a motion for a new trial based on juror misconduct, the district court should be reversed. *Fish v. Harris*, 2008 MT 302, ¶ 8, 345 Mont. 527, 192 P.3d 238.

V. ARGUMENT

1. Summary of the Argument

Rule 59 of the Montana Rules of Civil Procedure allows parties to move the Court for a new trial which may be granted for any reason

provided in the statutes of the State of Montana. Mont. R. Civ. P. 59(a). In this instance, a new trial is warranted due to misconduct of the jury. Mont. Code Ann. § 25-11-102(2). During the trial in this case, one juror, although being instructed opposite, decided to engage in legal research outside of trial and the jury room. The juror looked up an online definition of the word "preponderance," a word which had already been defined for the jury by the District Court. Aff. Strukel at ¶ 6. She then shared the results of her legal research with the jury. The facts demonstrate that this prohibited legal research improperly influenced at least some of the jurors, a deadlocked jury was able to reach an 11-1 verdict within five minutes of receiving the juror's definition of preponderance. Further, jurors disregarded the District Court's admonition against discussing the case outside of the jury room. Appellant should be granted a new trial because the verdict it received was not based solely on the jury instructions and evidence provided at trial.

2. Rule 59 Standard

Rule 59(g), Mont. R. Civ. P., authorizes a party to file a motion to alter or amend a judgment within ten (10) days of notice of entry of judgment. *Shull v. First Interstate Bank of Great Falls*, 262 Mont. 355, 358, 864 P.2d 1268, 1270 (1993). The Rule provides:

> **Motion to alter or amend judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after the service of the notice of the entry of the judgment, and may be combined with the motion for a new trial herein provided for. This motion shall be determined within the time provided herein above with respect to a motion for a new trial and if the court shall fail to rule on the motion within the 60 day period, the motion shall be deemed denied.

Mont. R. Civ. P. Rule 59(g).

A motion pursuant to Rule 59(g), Mont. R. Civ. P. is proper only to correct a manifest injustice. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, 304 Mont. 356, 22 P.3d 631. While Rule 59 does not identify any specific grounds supporting a motion to alter or amend a judgment, four basic grounds upon which a Rule 59 motion may be granted have been identified. *Nelson v. Driscoll*, 285 Mont. 355, 360, 948 P.2d 256, 259 (1997). First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Finally, a Rule 59 motion may be justified by an intervening change in controlling law. *Id.* (*citing* Wright, Miller and Kane, *Federal Practice and Procedure*, §§ 2810.0 (1995)).

Mont. R. Civ. P. 59(g) is identical to the Fed. R. Civ. P. 59(e), except the phrase "service of notice of" has been added in subdivisions (b) and (e). Mont. R. Civ. P. 59(g) commission note. Thus, interpretations of Fed. R. Civ. P. 59(e) have persuasive application to the interpretation of Mont. R. Civ. P. 59(g). *United States Fidelity and Guaranty Co. v. Rodgers*, 267 Mont. 178, 182, 882 P.2d 1037, 1039 (1994).

It is well-settled in the Ninth Circuit that a successful Rule 59 motion must accomplish two goals. First, the motion must demonstrate some reason why the court should reconsider its prior decision. Second, it must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. *Na Mamo O 'Aha'ino v. Galiher*, 60 F. Supp. 2d 1058, 1059 (D. Hawaii 1999). At the federal level, courts have established three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact in order to prevent manifest injustice. *See*, *Mustafa v. Clark County School District*, 157 F.3d 1169, 1178-79 (9th Cir. 1998).

Rule 59 offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources. *Carroll v.*

Nakatani, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted).

3. Facts Show A Manifest Injustice Will Result If the Verdict Is Upheld

In the case at bar, facts have come to light that demonstrate that the parties did not receive a fair trial. Specifically, it has come to Plaintiffs' counsel's attention that juror misconduct occurred during the course of the trial and deliberation process that prejudiced the parties. As a result, it appears the only appropriate course of action to uphold the sanctity of the judicial process is to provide both parties the opportunity to retry this matter.

As set forth in Rule 59, M.R.Civ.P., a new trial may be granted for any of the reasons set forth under statute of the state of Montana. As relevant here, Mont. Code Ann. § 25-11-102 provides:

> (2) misconduct of the jury. Whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

After the verdict was rendered in this case, a juror came forward with facts that show manifest injustice will result if the verdict is upheld. As set forth herein, while not appearing to be purposeful, there was clear

misconduct on the party of the Jury. Thus, to ensure justice is served, Plaintiffs respectfully request a mistrial declared and a new trial ordered.

A. A Juror Conducted Independent Research on a Critical Element to Reach a Decision in this Matter

If a jury resorts to the use of outside resources during the course of deliberations, the parties have not been guaranteed a fair trial and manifest injustice results. Mont Code Ann. §§ 25-11-102; 25-7-402 *et seq. See also Allers v. Riley*, 273 Mont. 1, 901 P.2d 600 (1995); *Brockie v. Omo Const., Inc.*, 255 Mont. 495, 499, 844 P.2d 61, 64 (1992) (independent research on extraneous materials which define a critical element is sufficient to demonstrate probable prejudice and potential injury to the losing party). Undisputed facts presented here, demonstrate that a Juror conducted independent research on an issue critical to the verdict reached in this matter.

In this regard, during the course of deliberations, an issue regarding the definition of the term "Preponderance" as used in the Special Verdict Form was raised by the Jury. Rather than seek clarification through the Court, the Jury looked to a member with knowledge of the English Language for a definition. Aff. Strukel at ¶ 8.

At the time this occurred, the Jury was deadlocked at 6-6 regarding a verdict. *Id.* at ¶ 6. After receiving this Juror's opinion regarding the definition of the term, the Jury adjourned deliberations due to personal schedule issues. The following morning, the Jury reconvened. The Jury was informed by a Juror No. 2 that the Juror had looked up the meaning of the word "Preponderance" and was in agreement with the definition previously given. *Id.*; *See also* Affidavit of Laurie Schneider, ¶ 4 (Sept. 25, 2009) ("I previously looked up the word 'preponderance' on the internet."). Within five minutes of reconvening deliberations, the Jury voted 11-1 in Defendant's favor. *Id.* at ¶ 9. (Exhibit G)

This fact alone warrants a new trial under Rule 59. The Montana Supreme Court has long recognized that a new trial is warranted where the misconduct results in actual or potential injury to the losing party. *Brockie v. Omo Const., Inc.*, 255 Mont. at 499, 844 P.2d at 64. In *Brockie*, the Plaintiff's son was killed while riding as a passenger in a car that skidded on an icy bridge and struck a flasher board. The location of the flasher board at the time of the accident was a critical issue in the case. By affidavit, two jurors testified that the foreman told them he conducted independent research regarding the issue and it confirmed the defense expert's testimony.

The Montana Supreme Court reversed the lower court's denial of plaintiff's motion for a new trial, finding that the foreperson's research, and the report of that research to two other jurors, was misconduct as defined by Mont. Code Ann. § 25-11-102(2). Moreover, the Montana Supreme Court found that *probable* prejudice resulted from the conduct. *Id. (Emphasis added).*

The situation presented here is clearly analogous and necessitates the same results. Here, the Jury deliberations regarding the first question on the Special Verdict Form became focused on whether "Plaintiffs had proven by a 'preponderance' of the evidence the Defendant breached its express warranty?" Rather than address this issue with the Court, the Jury turned to extraneous material. First, the opinion of a Juror and more damaging, one Juror's independent "on-line" research which had the effect of redefining a term already defined by the Court in its Instruction No. 3 - a term which is a critical element to Plaintiff's case given the necessity of having the burden of proof and the necessity of meeting that burden to be successful in the suit. As pointed out by the *Brockie* Court, such conduct is sufficient to demonstrate probable prejudice and potential injury to Plaintiffs. This warrants a new trial to correct this manifest injustice.

Moreover, the circumstantial evidence indicates actual prejudice.

After leaving deliberations at 5:00 p.m. on September 17, 2009, the jury was deadlocked. Upon reconvening, without further deliberation other than a report on the Juror's independent research, the Jury within 5 minutes voted 11-1 in favor of the Defendant. Without any additional discussion, the only logical conclusion one can reach is that the independent research carried sufficient weight to sway an otherwise deadlocked Jury. Such conduct directly countermanded this Court's precautionary instruction placing each Juror on notice that he or she was only to consider evidence presented in Court and to refrain from making any independent investigation. Thus, Plaintiffs respectfully request that a mistrial be declared and a new trial ordered to remedy this injustice.

B. Jurors Engaged in Discussions Regarding Case Outside Deliberations in the Presence of Fellow Jurors

In addition to the use of outside resources, it has also been reported that jurors discussed the case ***prior to the submission of evidence***. Aff. Strukel at ¶ 1. This juror also reported that when the evidence was finally submitted for deliberations, ***the evidence was not reviewed by the jury***. *Id.* at ¶ 5. Furthermore, one of the jurors announced a strong opinion and took a stand for a particular verdict, suggesting that another juror should

surrender an honest conviction. *Id* at ¶ 4. Finally, after deliberations were adjourned on September 17, 2009, three Jurors carried on discussions of the case outside the jury room and outside the presence of the Jury. *Id.* at ¶ 7. Each of these reported actions directly countermand the instructions of this Court and warranted, at a minimum, a hearing to take testimony regarding these events to make a proper determination whether they alone, or in total, caused prejudice to the Plaintiffs.

In this regard, on the evening of September 17, the jury deliberated approximately one and a half hours before taking a recess for the evening. Immediately prior to the recess, the jury was split on their decision, with six jurors in favor of the Plaintiffs. *Id.* However, after concluding their deliberations for the evening, several Jurors continued to discuss the facts of the case as they walked down the sidewalk. At least one of these Jurors had previously held a favorable view of the Plaintiffs' case while at least one other held a different view. By conducting discussions outside the presence of the Jury, the Jurors were left to consider overnight opinions other than those expressed in the Jury room. Upon reconvening the next morning, without any further discussion regarding the facts of the case and within 5 minutes the Jury voted 11-1 against Plaintiffs. The only discussion that did

occur in that five minutes was a report of the results from prohibited independent research, and the opinions formed during extraneous and prohibited conversations. Such conduct clearly demonstrates potential prejudice and, at a minimum, necessitated a hearing to determine the effects of the misconduct. Absent such action, manifest injustice will result.

C. *Erickson v. Perrett* Is Distinguishable from the Present Case.

The District Court relied upon *Erickson v. Perret* (1977), 175 Mont. 87, 572 P.2d 518. In *Erickson*, "several jurors ***inadvertently*** saw defendant's car during the noon recess where it was parked outside the courthouse." *Id.* at 91, 572 P.2d at 520 (emphasis added). One of the issues at trial was the amount of damage which was done to the defendant's car. *Id.* While some of the jurors saw the car, they stated that they did not inspect the car in any way. *Id.* at 92, 572 P.2d at 520. Moreover, other jurors in the case testified by affidavit that "***no juror provided any new or different information*** concerning the condition of defendant's car." *Id.* (emphasis added). The Court found no prejudice in the inadvertent viewing of the car.

The situation here stands in stark contrast to the situation in *Erickson*.

The juror's action in this case of researching the definition of "preponderance" online was done purposefully. The new definition, which essentially replaced the District Court's definition, was provided to the other jurors. The jury relied on this new information in reaching its verdict.

It is impossible to overlook the significant change in the Jury's opinion after it considered the online definition of preponderance. Within minutes of receiving the definition the vote changed from a 6-6 deadlock to a 11-1 majority in favor of Alside. While no prejudice was found in *Erickson*, the facts above make a finding of no prejudice impossible.

4. The juror affidavit submitted by Christine Strukel is properly submitted and should not be disregarded.

In support of its Rule 59 Motion, Plaintiffs attach the affidavit of Christine Strukel. This affidavit is properly submitted, probative of the issues presently at bar and should be considered by the Court. Although it has long been held that "juror affidavits that delve into the thought processes of the jury are inadmissible to support the granting of a new trial," there are clear exceptions to this rule. *See State Bank of Townsend v. Maryann's, Inc.*, (1983), 204 Mont 21, 29, 664 P.2d 295, 299; *Ahmann v. American Federal Savings and Loan Assoc.*, (1988) 235 Mont. 184, 766

P.2d 853 (Overruled on other grounds). In this instance, the affidavit does not seek to explain the actions of the Juror, but rather the fact that misconduct occurred that was subsequently confirmed by the perpetrating Juror. As such, Ms. Strukel's affidavit is properly submitted in this instance to support a mistrial and grant a new trial. *Ahmann v. American Federal Savings and Loan Assoc.*, (1988) 235 Mont. 184, 766 P.2d 853 (external influences, extraneous prejudicial information or irregularity in the jury proceedings may be demonstrated through affidavit, do not delve into the jury's thought process).

VI. CONCLUSION

As set forth above, the facts and law support a finding, pursuant to Rule 59, M.R.Civ.P., that a manifest injustice has occurred that may only be remedied by vacating the jury verdict and ordering a new trial. Therefore, Plaintiffs respectfully request that this Court reverse the District Court's denial of its Motion in Support of a New Trial Under Rule 59 and order a new trial.

DATED this ____ day of February, 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the following individuals by the means designated below this ____ day of February, 2010:

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that pursuant to Montana Rules of Appellate Procedure, Rule 27(d)(iv), the Appellant's Opening Brief is:

X Proportionally spaced, 14 pt and contains 3664 words.

X Does not exceed 10,000 words (opening and answering briefs) or 5,000 words (reply briefs).

Dated this 11th day of February, 2010.

Perry J. Schneider

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